



Montgomery
County Council

Committee: HHS
Committee Review: At a future date
Staff: Christine Wellons, Legislative Attorney
Purpose: To introduce agenda item – no vote expected
Keywords: #StopSexualHarassment

AGENDA ITEM #3A
March 24, 2020
Introduction

SUBJECT

Bill 14-20, Human Rights and Civil Liberties - Discriminatory Employment Practices - Workplace Harassment

Lead Sponsor: Councilmember Jawando

Co-Sponsor: Councilmember Navarro

EXPECTED ATTENDEES

None

COUNCIL DECISION POINTS & COMMITTEE RECOMMENDATION

- N/A; Bill introduction

DESCRIPTION/ISSUE

Bill 14-20, Human Rights and Civil Liberties - Discriminatory Employment Practices - Workplace Harassment would define and prohibit certain discriminatory harassment in the workplace; and define and prohibit certain sexual harassment in the workplace.

SUMMARY OF KEY DISCUSSION POINTS

- N/A

This report contains:

Staff Report

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Bill 14-20

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Legislative Request Report

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Sponsor's Memorandum

©6

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MEMORANDUM

March 19, 2020

TO: County Council

FROM: Christine Wellons, Legislative Attorney
Wellons

SUBJECT: Bill 14-20, Human Rights and Civil Liberties – Discriminatory Employment Practices – Workplace Harassment¹

PURPOSE: Introduction – no Council votes required

Bill 14-20 Human Rights and Civil Liberties – Discriminatory Employment Practices – Workplace Harassment, sponsored by Lead Sponsor Councilmember Jawando and Co-Sponsor Councilmember Navarro, is scheduled to be introduced on March 24, 2020. A public hearing is tentatively scheduled for April 14, at 1:30 p.m.

Bill 14-20 would define and prohibit discriminatory harassment and sexual harassment by employers² in the County. Significantly, the bill would alter the level of harassing conduct that constitutes an employment discrimination claim under County law. Harassment would not need to raise to the level of being “severe or pervasive” to be actionable; the harassment would be actionable as long as it was “more than a petty slight, trivial inconvenience, or minor annoyance.”

BACKGROUND

Maryland’s highest court has held that a chartered county, such as Montgomery County, “has the authority to prohibit discrimination occurring in the county, to define the elements of a claim by one injured by such discrimination, to provide for an adjudicatory administrative proceeding by which the injured party may obtain relief, and to provide for a traditional judicial review action in the circuit court for a party aggrieved by the final administrative decision.” *Edward Systems Technology v. Corbin*, 379 Md. 278, 298 (2002). Put another way, the County may, among other things, “decide what will constitute actionable discrimination” within the County. *Id.* See also State Gov’t § 20-1202.

In accordance with this authority, Montgomery County has defined and prohibited discrimination in employment, among other types of discrimination, under Chapter 27 of the County Code. Chapter 27 also provides for an administrative adjudicatory process, through the Office of Human Rights (OHR), and for civil actions under Maryland law.

Currently, Chapter 27 does not define “discriminatory harassment” or “sexual harassment” *per se*, although these practices generally fall within the County’s prohibition against employment discrimination under Section 27-19. Bill 14-20 would specifically define and prohibit these types

¹ #StopSexualHarassment

² “Employer” under County anti-discrimination laws “means any person who employs one or more individuals in the County, either for compensation or as a volunteer. Employer includes a person who recruits an individual in the County to apply for employment in the County or elsewhere. Employer includes Montgomery County and its instrumentalities and agencies.” County Code Section 27-6.

of harassment. Furthermore, the bill would specify that, in the County, such harassment is actionable when it rises above the level of being “more than a petty slight, trivial inconvenience, or minor annoyance.” These standards of prohibited harassment would be similar to those used under a recently enacted law of the State of New York (New York Senate Bill 6577, which was signed into law by Governor Cuomo on August 12, 2019).

SPECIFICS OF THE BILL

Bill 14-20 would define prohibited “harassment” to include “verbal, written, or physical conduct, whether or not the conduct would be considered sufficiently severe or pervasive under precedent applied to harassment claims, when:

- (A) the conduct is based upon an individual’s race, color, religious creed, ancestry, national origin, age, sex, marital status, sexual orientation, gender identity, family responsibilities, genetic status, or disability;
- (B) (i) submission to the conduct is made either explicitly or implicitly a term or condition of an individual’s employment;
(ii) submission to or rejection of the conduct is used as a basis for employment decisions affecting the individual; or
(iii) the conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating a working environment that is perceived by the victim to be abusive or hostile; and
- (C) a reasonable victim of discrimination would consider the conduct to be “more than a petty slight, trivial inconvenience, or minor annoyance.”

Prohibited “sexual harassment” would have a similar definition, except that the definition would focus specifically on sexual conduct, including “unwelcome sexual advances, requests for sexual favors, or other verbal, written, or physical conduct of a sexual nature.”

For all types of discriminatory harassment in employment – including sexual harassment – a complainant would not need to show that conduct was “severe or pervasive,” which is the standard currently used by courts when interpreting harassment claims under the County’s employment discrimination law. *See, e.g., Magee v. Dansources Tech. Servs.*, 137 Md. App. 527, 549 (explaining that, in order for conduct to violate County, state, and federal employment discrimination laws, the conduct must be “sufficiently severe or pervasive to alter the plaintiff’s conditions of employment and to create an abusive work environment”). Instead, the prohibited harassment would be actionable when considered to be “more than a petty slight, trivial inconvenience, or minor annoyance.”

The bill would not alter damages or penalties for employment discrimination. Under Section 27-8 of the County Code, employment discrimination may result in the employer paying damages, in addition to civil fines in the amount of \$5,000 per violation. After exhausting administrative remedies, an individual may bring a civil action under Maryland law. (Section 27-9).

This packet contains:

Bill 14-20

Legislative Request Report

Sponsor’s Memorandum

Circle #

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Bill No. 14-20
Concerning: Human Rights and Civil Liberties – Discriminatory Employment Practices – Workplace Harassment
Revised: 03/06/2020 Draft No. 3
Introduced: March 17, 2020
Expires: September 17, 2021
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Councilmember Jawando
Co-Sponsor: Councilmember Navarro

AN ACT to:

- (1) define and prohibit certain discriminatory harassment in the workplace;
- (2) define and prohibit certain sexual harassment in the workplace; and
- (3) generally amend the law regarding discriminatory employment practices.

By amending

Montgomery County Code
Chapter 27, Human Rights and Civil Liberties
Sections 27-19

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Sections 27-19 is amended as follows:

27-19. Discriminatory employment practices.

(a) A person must not because of the race, color, religious creed, ancestry, national origin, age, sex, marital status, sexual orientation, gender identity, family responsibilities, or genetic status of any individual or disability of a qualified individual, or because of any reason that would not have been asserted but for the race, color, religious creed, ancestry, national origin, age, sex, marital status, disability, sexual orientation, gender identity, family responsibilities, or genetic status:

(1) For an employer:

(A) fail or refuse to hire, fail to accept the services of, discharge any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment; [or]

(B) limit, segregate, or classify employees in any way that would deprive or tend to affect adversely any individual's employment opportunities or status as an employee; or

(C) subject an individual to harassment, including sexual harassment;

* * *

(b) Definitions.

(1) The term "discriminate" in subsection (a) includes excluding, or otherwise denying, equal job opportunity or benefits to, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.

27 (2) The term “harassment” in subsection (a) includes verbal, written,
28 or physical conduct, whether or not the conduct would be
29 considered sufficiently severe or pervasive under precedent
30 applied to harassment claims, when:

31 (A) the conduct is based upon an individual’s race, color,
32 religious creed, ancestry, national origin, age, sex, marital
33 status, sexual orientation, gender identity, family
34 responsibilities, genetic status, or disability;

35 (B) (i) submission to the conduct is made either explicitly
36 or implicitly a term or condition of an individual’s
37 employment;

38 (ii) submission to or rejection of the conduct is used as
39 a basis for employment decisions affecting the
40 individual; or

41 (iii) the conduct has the purpose or effect of
42 unreasonably interfering with an individual’s work
43 performance or creating a working environment
44 that is perceived by the victim to be abusive or
45 hostile; and

46 (C) a reasonable victim of discrimination would consider the
47 conduct to be more than a petty slight, trivial
48 inconvenience, or minor annoyance.

49 (3) The term “sexual harassment” in subsection (a) includes
50 unwelcome sexual advances, requests for sexual favors, or other
51 verbal, written, or physical conduct of a sexual nature, whether or
52 not the conduct would be considered sufficiently severe or
53 pervasive under precedent applied to harassment claims, when:

- 54 (A) (i) submission to the conduct is made either explicitly
55 or implicitly a term or condition of an individual's
56 employment;
- 57 (ii) submission to or rejection of the conduct is used as
58 a basis for employment decisions affecting the
59 individual; or
- 60 (iii) the conduct has the purpose or effect of
61 unreasonably interfering with an individual's work
62 performance or creating a working environment
63 that is perceived by the victim to be abusive or
64 hostile; and
- 65 (B) a reasonable victim of discrimination would consider the
66 conduct to be more than a petty slight, trivial
67 inconvenience, or minor annoyance.

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LEGISLATIVE REQUEST REPORT

Bill 14-20

Human Rights and Civil Liberties – Discriminatory Employment Practices – Workplace Harassment

DESCRIPTION: Bill 14-20 would define and prohibit certain discriminatory harassment in the workplace and define and prohibit certain sexual harassment in the workplace.

PROBLEM: Victims of alleged discriminatory harassment generally must demonstrate that the harassment has been severe or pervasive.

GOALS AND OBJECTIVES: Prohibit discriminatory workplace harassment, including sexual harassment, that a reasonable victim would consider to be more than a petty slight, trivial inconvenience, or minor annoyance.

COORDINATION: Office of Human Rights

FISCAL IMPACT: OMB

ECONOMIC IMPACT: OLO

EVALUATION: To be done.

EXPERIENCE ELSEWHERE: New York State / To be researched.

SOURCE OF INFORMATION: Christine Wellons, Legislative Attorney

APPLICATION WITHIN MUNICIPALITIES: N/A

PENALTIES: Damages, and \$5,000 civil penalty per violation, under County Code Section 27-8

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MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

WILL JAWANDO
COUNCILMEMBER
AT-LARGE

TO: Councilmembers
FROM: Will Jawando, Councilmember
DATE: March 10, 2020
SUBJECT: Bill XX-20, Human Rights and Civil Liberties – Discriminatory Employment Practices – Workplace Harassment.

On March 17, I will be introducing Bill XX-20, Human Rights and Civil Liberties – Discriminatory Employment Practices – Workplace Harassment. Over the last several years the “Me Too” movement has brought to light the pervasiveness of workplace sexual harassment. In 2018, NPR reported that a survey conducted by the nonprofit Stop Street Harassment found that “81 percent of women and 43 percent of men have experienced sexual harassment.”

Current case law has created an extremely high standard of “severe or pervasive” to prove harassment cases. In the absence of a codified definition for harassment or sexual harassment, current practice limits the ability to seek a remedy in cases where individuals have been harassed. This legislation creates definitions of harassment and sexual harassment and sets a reasonable standard so victims can seek a remedy.

This legislation requires that:

- 1) The term “harassment” in subsection (a) is defined as “include verbal, written, or physical conduct, regardless of whether the conduct would be considered sufficiently severe or pervasive under precedent applied to harassment claims”;
- 2) The term “sexual harassment” in subsection (a) is defined as “unwelcome sexual advances, requests for sexual favors, or other verbal, written, or physical conduct of a sexual nature, whether or not the conduct would be considered sufficiently severe or pervasive under precedent applied to harassment claims.”

The goal of this bill is to ensure there is clear definitions of harassment and sexual harassment. With the explicit removal of the “severe or pervasive” standard the bill allows allegations that “a reasonable victim of discrimination would consider the conduct to be more than a petty slight, trivial inconvenience, or minor annoyance.”

If you have any questions or if you would like to co-sponsor the draft bill, please contact Fatmata Barrie in my office. Thanks in advance for your consideration.

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